

No. 6426 //

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CHIN CHING,

Appellant,

VS.

JOHN D. NAGLE, as Commissioner of
Immigration for the Port of San
Francisco, California,

Appellee.

BRIEF FOR APPELLANT.

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STATEMENT OF THE CASE.

This appeal is taken from the order of the District Court for the Northern District of California denying a petition for a writ of habeas corpus. (Tr. of R. p. 38.)

The appellant is a Chinese person who was born in China on April 22, 1909. He arrived in the Port of San Francisco on May 28, 1930, and, thereupon, applied to the immigration authorities for admission to the United States, claiming that he was a citizen thereof by virtue of the American nativity and citizenship of his father, Chin Kim. (Section 1993 of Revised Statutes.) A Board of Special Inquiry, which was convened at the port, decided that the appellant was not the son of Chin Kim, his alleged

father, although it conceded that the latter was a native citizen of the United States. An appeal was taken to the Secretary of Labor with the result that the decision of the Board of Special Inquiry was affirmed.

In the Court below, there were filed, as part of the petition, the following exhibits: (1) Exhibit "A"—Findings and Decision of Board of Special Inquiry (Tr. of R. pp. 19-27); Exhibit "C"—Findings and Decision of Secretary of Labor. (Tr. of R. pp. 29-31.) At the hearing of the petition, the original immigration records were filed as part of the petition and these records, by order of the Court below (Tr. of R. p. 45), have been transmitted to this Court.

APPOINTMENT.

In behalf of the appellant, it is contended that the evidence adduced before the immigration authorities established to a reasonable certainty that he was the son of his alleged father and that, in denying the existence of the claimed relationship, these authorities acted arbitrarily and unfairly.

Go Lan v. Noye, 22 Fed. (26) 246, C. C. A. 5th.

Gung Yau v. Noye, 34 Fed. (34) 645, C. C. A. 5th.

Han Chung v. Noye, 41 Fed. (26) 126, C. C. A. 5th.

Noye v. Jim Seng, 41 Fed. (34) 522, C. C. A. 5th.

Louis Poy Huh v. Noye, No. 6349, decided April 6, 1931, C. C. A. 5th.

Firstly, let us examine the record to ascertain whether or not the alleged father has a son, whom the appellant might be. In this connection, the record shows that the alleged father departed from the United States on his second trip to China on June 30, 1908, and that he returned to this country on February 26, 1909. (Tr. of E. p. 16.) He was, therefore, in China at a time to render possible his paternity to a child, who was born on April 21, 1909, which is the birthdate of the appellant. He departed from the United States on his third trip to China on April 24, 1912, and returned on December 8, 1913. (Tr. of E. p. 17.) Incident to his return on December 8, 1913, he testified before the immigration authorities that he had a son by the name of Chin Jung (Jung is variously pronounced as Ching and Chung and Ting), who was born on the Chinese date of S. T. 4-1-1, which is equivalent to our April 21, 1909. His testimony was as follows:

“Q. How many children have you ever had?”

A. Three boys, no girls.

Q. Give name, sex, age, date of birth, and present location of each.

Name	Age	Sex	Birthdate	Location
Chin Park	8	M	S.S. 31-8-15	China
Chin Jung	5	M	S.T. 4-1-1	China
Chin Sou	1	M	C.E. 2-1-9	China

(Respondent's Exhibit "D," p. 29.)

Thereafter, he made trips from the United States to China, as follows: departed on March 27, 1917, and returned on May 11, 1920; departed on April 18, 1925, and returned on October 17, 1928. (Tr. of E. p. 17) and it will not be denied that on the occasion

father, although it conceded that the latter was a native citizen of the United States. An appeal was taken to the Secretary of Labor with the result that the decision of the Board of Special Inquiry was affirmed.

In the Court below, there were filed, as part of the petition, the following exhibits: (1) Exhibit "A"—Findings and Decision of Board of Special Inquiry (Tr. of R. pp. 16-22); Exhibit "C"—Findings and Decision of Secretary of Labor. (Tr. of R. pp. 29-31.) At the hearing of the petition, the original immigration records were filed as part of the petition and these records, by order of the Court below (Tr. of R. p. 45), have been transmitted to this Court.

ARGUMENT.

In behalf of the appellant, it is contended that the evidence adduced before the immigration authorities established to a reasonable certainty that he was the son of his alleged father and that, in denying the existence of the claimed relationship, these authorities acted arbitrarily and unfairly.

Go Lun v. Nagle, 22 Fed. (2d) 246, C. C. A. 9th.;

Gung Yow v. Nagle, 34 Fed. (2d) 848, C. C. A. 9th.;

Hom Chung v. Nagle, 41 Fed. (2d) 126, C. C. A. 9th.;

Nagle v. Jin Suey, 41 Fed. (2d) 522, C. C. A. 9th.;

Louie Poy Hok v. Nagle, No. 6349, decided April 6, 1931, C. C. A. 9th.

Firstly, let us examine the record to ascertain whether or not the alleged father has a son, whom the appellant might be. In this connection, the record shows that the alleged father departed from the United States on his second trip to China on June 30, 1908, and that he returned to this country on February 26, 1909. (Tr. of R. p. 16.) He was, therefore, in China at a time to render possible his paternity to a child, who was born on April 22, 1909, which is the birthdate of the appellant. He departed from the United States on his third trip to China on April 24, 1912, and returned on December 8, 1913. (Tr. of R. p. 17.) Incident to his return on December 8, 1913, he testified before the immigration authorities that he had a son by the name of Chin Jung (Jung is variously pronounced as Ching and Chung and Tung), who was born on the Chinese date of S. T. 1-3-3, which is equivalent to our April 22, 1909. His testimony was as follows:

“Q. How many children have you ever had?

A. Three boys, no girls.

Q. Give name, sex, age, date of birth, and present location of each.

Name	Age	Sex	Birthdate	Location
Chin Park	8	M	K.S. 32-8-15	China
<i>Chin Jung</i>	<i>5</i>	<i>M</i>	<i>S.T. 1-3-3</i>	<i>China</i>
Chin Som	1	M	C.R. 2-1-9	China”

(Respondent's Exhibit “D,” p. 29.)

Thereafter, he made trips from the United States to China, as follows: departed on March 27, 1917, and returned on May 11, 1920; departed on April 18, 1925, and returned on October 17, 1928 (Tr. of R. p. 17) and it will not be denied that on the occasion

of his departure and return on each of these trips he reiterated his claim to have a son, who bears the name of the appellant and who was born on the same date as the appellant.

We have, therefore, the established fact that the alleged father was in China at a time to render possible his paternity to the appellant and the further fact that he has consistently mentioned over a period of many years a son, who bears the name of the appellant and who was born on the same date as the appellant. Concerning such facts, this Court, in *Louie Poy Hok v. Nagle*, supra, recently said:

“A similar case arose in *Ng Yuk Ming v. Tillinghast*, 28 F. (2d) 547, C. C. A. 1. There, ‘thirteen years before the father testified before the immigration authorities that he had a son bearing the name of applicant, which he confirmed on every occasion upon which he was called upon to testify.’ The decision of the Court was that the decision of the immigration officials was not supported by the evidence and the prisoner was ordered released from custody. See, also, *Gung You v. Nagle*, 34 Fed. (2d) 848, C. C. A. 9th. In the instant case the cumulative effect of the repeated assertions by the father and the previously entered alleged brothers that there was a third son, Louie Fung Leung, born October 1, 1909, certainly go farther than a mere indication that the three were suffering from a delusion; the effect of the testimony in the mind of any reasonable man must be to create the belief that there was a third son somewhere in the offing.”

Secondly, let us consider the testimony to ascertain whether or not the same reasonably establishes that

the appellant is the son, whom the alleged father has consistently mentioned. In this connection, we have, first, the testimony of the appellant and the alleged father, showing that they have testified in agreement as to minute details of a myriad of subjects, as follows: that the father of the appellant is named Chin Kim, that he is also known as Chin Ying Lin, that he is 55 years old, that he was born in San Francisco, that he is a laundryman by occupation, that he was last in China between the years 1925 and 1928; that the father of the appellant has been married twice, that his first wife was named Louie Shee, that she died in China in 1908, that he had no children by his wife, Louie Shee, but that he and Louie Shee adopted a son by the name of Chin Bock, who applied for admission to the United States in 1921, who was deported from the United States, who died in China in 1922 and who was buried in a hill located about one li (about 1/3 of mile) in back of Ung Sing village, China; that the father of the appellant married his second wife, Lee Shee, in China in 1908, that they were married at San Yuen village, Sun Ning District, China, the native village of Lee Shee; that Lee Shee is 39 years old, that she has natural feet and that she is living at Ung Sing village, Sun Ning District, China; that the father of the appellant has had five sons by his wife, Lee Shee, that these sons are: Chin Ching, 21 years old, who is the appellant; Chin Sam, 18 years old, Chin Git, 11 years old, Chin Ng, 6 years old, Chin May, 4 years old, that all of these sons were born at Ung Sing village and all have been living there with their mother; that the paternal grandfather

of the appellant was named Chin Guey Yee, that he died at San Francisco in May, 1929, and that he is buried in San Francisco; that the paternal grandmother of the appellant is named Yee Shee, that she is 87 or 88 years old and that she is living at Sacramento, California; that the appellant has never seen either of his paternal grandparents; that the appellant has one paternal uncle, Chin Sing, who is 32 or 33 years old, who is single, who lives in the United States and who has never been to China; that the appellant has no paternal aunts; that the maternal grandfather of the appellant is named Lee You Choon, that he resides in Mexico; that the maternal grandmother of the appellant was named Wong Shee, that she died 2 or 3 years ago at San Yuen village, China; that the appellant has one maternal uncle, Lee Sing, who is living in Mexico; that Ung Sing village, where the appellant was born and has lived, contains 16 dwellings, which are arranged in four rows with four houses to each row, and one schoolhouse which stands by itself at the west end of the village, that the village faces south; that an adobe wall about four feet high extends across the rear and on the east and west sides of the village, that there is no wall in front of the village, that the country in front of the village is used for growing rice, that there is no fish-pond in the village, that there is a gateway at each of the east and west sides, that the gateways are not arched on top, that the gateways are not locked at night; that water for household purposes is obtained from a well located a short distance in front of the schoolhouse, that there is only one well in the village; that

all the houses in the several rows of the village touch each other; that there is no ancestral hall in the village, that the nearest ancestral hall is located at Sun Ning City, which is about 12 or 13 lis (about 4 miles) east of Ung Sing village; that the schoolhouse in the village is about one-half the size of a regular dwelling, that it is made of brick, that it has dirt floors, that it has one outside entrance, that the school is called Ung Sing, that the name of the school appears over the entrance in Chinese characters "Ung Singja Sit," that when the appellant's father arrived home in 1925, the appellant and his brothers, Chin Sam and Chin Git, were attending this school, that the village school-teacher was named Chin Kee, that he is about 50-odd years old, that he came from Ow Sam village, which is about 20 lis (about 7 miles) distant from Ung Sing village, that he slept at the schoolhouse, that the school hours were from 8 A. M. to 12 M. and with an hour for lunch and from 1 P. M. to 5 P. M., that the appellant always came home for his lunch; that the appellant's house is the second in the second row counting from the east of the village, that it is one story, that it is made of brick, that it contains five rooms, which are: two bedrooms, two kitchens and a parlor, that it has dirt floors throughout, that it has an open court, which is paved with brick, that it has no outside windows, that it has two outside entrances, the large door of which opens to the east and the small door of which opens to the west, that each bedroom has a double skylight, that each kitchen has a single skylight, that there is a loft in each bedroom and a shrine loft in the parlor, that all of the lofts are

attached to the rear wall of the several rooms, that both of the kitchens are used for cooking, that each kitchen has a stationary stove, which is made of brick, that the stoves have no chimneys, that fuel is stored in the kitchens, that the stoves are attached to the wall between the bedrooms and kitchens; that when the appellant's father was last in China between 1925 and 1928, the appellant's father, his wife and their two youngest sons, Chin Ng and Chin May, slept in the bedroom on the west side of the house and that the three oldest sons, including the appellant, slept in the bedroom on the east side; that when the appellant's father was last in China, he remained at all times in Ung Sing village, except that in the latter part of 1927 he made a trip, alone, to Hongkong on which he remained three or four days; that the nearest market to Ung Sing village is called Sam Gop Market, that it is about 8 lis (about 3 miles) east of Ung Sing village, that when the appellant's father was last in China, he frequently visited this market, that he made his headquarters at Wing Kee Company in this market, that he occasionally took the appellant with him on trips to the market; that Ai Gong Market is located about 3 pos (about 10 miles) from Ung Sing village, that when the appellant's father was last in China he occasionally visited this market but that he never took the appellant with him; that when the appellant's father was last in China, he, in company with the appellant and with his two youngest sons, Chin Sam and Chin Git, visited the grave of his deceased adopted son, Chin Bock, during the Ching Ming Festival of 1926, 1927 and 1928, that the grave

of this adopted son is not marked by any stone or tablet; that there is a small stream of water located about five or six lis (about 2 miles) from Ung Sing village to the west, that this stream is not navigable; that Chin Ai Lee, who died about 6 or 7 years ago, lived in the house opposite the large door of the appellant's house, that this house is now occupied by Chin Ai Lee's wife and his mother, who is past 60, that Chin Ai Lee had no children; that Chin Ai Moon, about 40 years old, a farmer, lived with his wife and son, Chin Foo, about 12 years old, in the house opposite the small door side of the appellant's house; that Chin Ai Git, about 40 years old, a farmer, lived with his wife and son, Chin Yow, about 6 years old, and his daughter, Chin Ngew, about 15 years old, in the house immediately in front of the appellant's house; that Chin Ying, about 50 years old, a farmer, lived with his wife and son, Chin On, about 20 years old, in the house immediately to the rear of the appellant's house; that the appellant has written many letters to his father since the latter's return to the United States in 1928, that the appellant's father has several of these letters in his possession; that the appellant's father left Ung Sing village to return to the United States in September, 1928, that immediately before commencing his journey to the United States he bade his family goodbye at his house, that the appellant helped him to carry his baggage as far as Sai Ning Railway Station, where he took a train at about 10 o'clock A. M.; that a village known as Lower Ung Sing village is located about one-half a li (about 1/6 of a mile) west of the appellant's native village of

Ung Sing, that Lower Ung Sing village has 50 or 60 houses, that it is not surrounded by a wall, but that it is surrounded by bamboo trees; that Yung Shee Yuen village is located about 3 lis (about one mile) in front of the appellant's village, that Yung Shee Yuen village is inhabited by Lew family people; that Kee Lung village is located about 8 lis north (about 3 miles) of the appellant's village, that it is occupied by Toy family people. (Respondent's Ex. "A," pp. 9-18, 20-33, 72-78, 75-78; Tr. of R. pp. 4-10.)

In addition to the testimony of the appellant and his alleged father, there is the testimony of an unrelated witness by the name of Lee Yew. This witness claims that, while in China on a recent visit, he called at the home of the appellant in Ung Sing village and there met the appellant and his mother. (Respondent's Exhibit "A," pp. 18-20.) Furthermore, the record shows that this witness, upon his return in October, 1929, from his trip to China, testified before the immigration authorities that he called upon the family of Chin Kim, the appellant's alleged father, and that he had there met the wife and sons of Chin Kim. (Respondent's Exhibit "E," p. 3.) The testimony of this witness, while it does not directly go to the issue of relationship between the appellant and his alleged father, nevertheless, it is, at least, corroborative of the testimony of the appellant and his alleged father as to the place in China where the appellant has resided.

The testimony offered to establish the identity of the appellant as the son, to whom Chin Kim, the

alleged father, has so often alluded in the past, is further supplemented by several letters, which the father exhibited to the Board of Special Inquiry as having been received from the appellant and by an old photograph of the appellant sent by the latter to the father in the year 1922. These letters are contained in respondent's Exhibit "B" and the photograph is contained in a large envelope under the same exhibit. Concerning the photograph, the appellant testified as follows:

"Q. (Again showing full length photograph presented by the attorney of record, which purports to be that of the applicant.) This photograph I show you—Do you know who possesses this photograph?

A. Yes, my father.

Q. How did that get into your alleged father's hands?

A. Because I sent this photograph to my father in C. R. 11 (1922).

Q. Are you sure that your alleged father did not come into possession of that photograph when he was in China on his last visit from C. R. 14 (1925) to C. R. 17 (1928)?

A. I am sure I sent this picture to my father in C. R. 11 (1922)."

(Respondent's Exhibit "A," pp. 30-31.)

In rejecting the affirmative evidence adduced in support of the claimed relationship, the immigration authorities relied upon certain testimonial discrepancies. We quote the pertinent part of the decision of the Secretary of Labor, as follows:

"* * * The record shows that the alleged father was in China at a time to make possible

his paternity to a child of the applicant's asserted age and that in 1913 he claimed to have a son of this applicant's description. It also shows that in 1921 this alleged father attempted to bring into the United States one Chin Pok as his son whose birth year was given as 1906. When confronted with his testimony in 1907, that he had no children, the alleged father said that Chin Pok was an adopted son. Chin Pok was excluded and, his appeal being dismissed by the Department, deported.

The alleged father who was last in China in 1928, and an alleged acquaintance, who claims to have met the applicant in 1929, appeared to testify. The testimony shows such discrepancies as the following:

The applicant and his alleged father now agree that there is an adobe wall four feet high about three sides of the home village which the alleged father says has been twenty or thirty years. But the alleged father's 1921 record shows that he then testified that there was no wall about his village. Similarly while the applicant and his alleged father now agree that the only well in the village is near the school at the tail of the village in 1921, the alleged father said that the only well in his village was located in front of his row near the other end of his village. The attorney attempts to minimize the damaging force of these discrepancies by saying that whereas the alleged father has been at home for three years, 1925-1928, since 1921, he had been at home only occasionally before 1921, but his record shows that he was in China on four visits prior to 1921 and that the last of them, 1917-1920, was a three year visit.

The alleged father says that all of his three oldest sons were attending school when he went home in 1925 and that none of them started to go to school while he was there. The applicant says that one of these three was not attending school when his father came home and did start in March, 1928. Also while the alleged father says that his son who the applicant claims to be attended school only six days a week when he (the alleged father) was at home last, the applicant declares that he attended school every day, seven days a week.

The alleged father says that his village has sixteen toilets which are located inside the village wall. The applicant says that his village has ten toilets which are located outside the wall of his village. The disagreement is confirmed in diagram approved as correct by the alleged father and the applicant, respectively.

The alleged father says that the widow and mother of a deceased neighbor were living in the house next to his own when he was last in China. The applicant says that the house next to his was occupied by one woman living alone when his father was last at home. The father gives the age of an occupant of the house next door on the other side as twelve whereas the applicant gives that person's age at twenty.

The alleged father testifies that the applicant and Chin Pok, the deportee referred to above, never attended school together in the home village. The applicant testifies that he and Chin Pok attended school together in the home village for two or three years.

In view of the appearance of such discrepancies, which could not reasonably be expected to appear

in a bona fide case, it is not thought that the evidence reasonably established this applicant's claim to be the son of his alleged father. * * *"

(Tr. of R. pp. 29-31.)

The testimony of the appellant and his alleged father is, therefore, said to be discrepant in only four particulars, as follows:

1. The time when one of the alleged father's three oldest sons commenced to attend school.
2. The number and location of the toilet houses in the appellant's home village.
3. The occupants of the houses adjoining the appellant's house.
4. The attendance at school of the appellant with an older brother.

We will discuss the several matters in the order of the enumeration.

1. THE TIME WHEN ONE OF THE ALLEGED FATHER'S THREE OLDEST SONS COMMENCED TO ATTEND SCHOOL.

As heretofore noted, the alleged father was last in China between 1925 and September, 1928. He stated, at first, that when he arrived in China in 1925, his three oldest sons had commenced to attend school (Respondent's Exhibit "A," p. 12); the appellant agreed as to two of the oldest sons having commenced, but stated that the third, Chin Git, did not start until March, 1928. (Respondent's Exhibit "A," p. 23.) The father, however, later modified his testimony by

stating that Chin Git commenced to attend school in 1927, and explained that he was mistaken when he first stated that this son had commenced in 1925, because of his momentary failure to realize the difference in the ages between his second and third sons. (Tr. of R. p. 33.) The only question, therefore, is whether or not any sinister motive should be attributed to the alleged father for this modification in testimony whereby he became in substantial agreement with the appellant. In answer, we believe that it may be fairly stated that the ordinary father, especially if he have many children, would be unable to recall, if suddenly asked, the exact year or years in which one or all of his children commenced to attend school, but that he would find it necessary to indulge in mathematical calculation, as by a comparison of the ages of the children, in order to reckon the exact year. Taking, therefore, common experience and observation as a standard of comparison, we submit that the change or modification in the father's testimony was reasonable, rather than the result of deliberate falsehood.

At the very most, the discrepancy involves only a question of dates, that is, as to whether the son, Chin Git, commenced to attend school in 1925 or in 1927, a subject concerning which the mind is particularly frail.

Nagle v. Dong Ming, 26 Fed. (2d) 438.

In *Wong Bing Pon v. Carr*, 41 Fed. (2d) 604, a matter not unlike that here involved was discussed and this Court, at page 605, said:

“* * * The Board of review dismissed from consideration various minor discrepancies, and finally relied upon two (apart from the question of applicant's age) as supporting the finding that the claimed relationship was not established. *The first concerned appellant's statement that he saw his father 2 years ago, when as a matter of fact the father had returned to the United States from China but 6 months prior to appellant's arrival.* It is suggested in argument that further questioning on this subject would have developed the absence of discrepancy as to this point, because of the differences between the Chinese and the American methods of reckoning time. However this may be, appellant was given no opportunity to explain his answer, in the face of the fact that his entire examination showed him to be extremely vague in his ability to fix dates. In view of this failure to pursue the subject, it must be held that this discrepancy is without substance.”

2. THE NUMBER AND LOCATION OF THE TOILET HOUSES IN THE APPELLANT'S HOME VILLAGE.

According to the Secretary of Labor, the alleged father stated that his village has sixteen toilet houses, which are located inside of the village wall, whereas the appellant stated that the village has ten of these houses, which are located outside the wall. The probability is that there are such houses both on the inside and on the outside of the wall, with perhaps a total of sixteen houses. The matter is unimportant and wholly immaterial to the issue of relationship.

In *Wong Tsick Wye, et al. v. Nagle*, 33 Fed. (2d) 226, C. C. A. 9th., it was held that a discrepancy, *inter alia*, between two applicants, who claimed to be uncle and nephew, who has just arrived from China and who had attended school together in China up to the time of their departure for the United States, as to whether or not there was a storehouse for fuel in back of the schoolhouse, was insufficient to defeat the claimed relationship.

In *Nagle v. Wong Ngook Hong*, 27 Fed. (2d) 650, C. C. A. 9th., it was held that a discrepancy as to the existence of a bridge in the immediate vicinity of the applicant's home village was insufficient to defeat the claimed relationship.

In *Hom Chung v. Nagle*, 41 Fed. (2d) 126, C. C. A. 9th., it was held that a discrepancy between an applicant, who had attended school in China immediately prior to his departure for the United States, and his alleged father, who claimed to have visited the applicant at school on many occasions during a recent visit to China, as to whether the school had five rooms or only one room, was insufficient to defeat the claimed relationship.

3. THE OCCUPANTS OF THE HOUSE ADJOINING THE APPELLANT'S HOUSE.

According to the Secretary of Labor, the alleged father stated that a widow and mother of a deceased neighbor were living in the house next to the appellant's house when he was last in China, whereas the appellant, at first, stated that only one lady was living

in this house during the father's last visit to China. The appellant, however, qualified his testimony by stating that two women had lived in that house, but that one of the women had gone away to work. The Secretary of Labor comments upon the appellant's statement, as qualified, as follows:

“Whereas the alleged father originally testified that opposite the large door of his house two women, the widow and the mother of a deceased neighbor lived, the applicant testified that only one woman, the widow, lived there. Now, the applicant says that the mother went away to work but he originally said that he never saw that woman.”

(Tr. of R. p. 35.)

We submit that some allowance must be made for lapse of memory and temporary forgetfulness and that it is hardly fair to conclude that the appellant has deliberately given false testimony merely because he qualifies his original testimony.

In *Gung Yow v. Nagle*, 34 Fed. (2d) 848, at page 852, this Court said:

“* * * Evidence concerning the town or village of the home is adapted to develop the question as to whether or not the applicant lived in the village and thus in the home from which he claims to come. But discrepancies here must be of the most unsatisfactory kind upon which to base a finding of the credibility of a witness, and when the cross-examiner and the Board of Inquiry know nothing of the actual facts concerning the village, the result is even more unsatisfactory and inconclusive. *It would seem then*

that the discrepancy in the testimony of a witness, to justify a rejection of the testimony, must be on some fact logically related to the matter of relationship and of such a nature that the error or discrepancy cannot reasonably be ascribed to ignorance or forgetfulness, and must reasonably indicate a lack of veracity."

4. THE ATTENDANCE AT SCHOOL OF THE APPELLANT WITH AN OLDER BROTHER.

It appears that the appellant has an older brother, Chin Pok, who applied for admission to the United States in 1921 and who was deported. The alleged father testified that the appellant and Chin Pok did not attend school together in China, whereas the appellant testified that they did go to school together for two or three years. As Chin Pok is claimed to have died in 1922, it is apparent that if these two boys went to school together it was many years ago. After so many years, the alleged father might easily forget the details of the schooling of these boys, especially as to whether or not they actually attended school together. Furthermore, Chin Pok was three years older than the appellant and, naturally, he must have been in a class somewhat farther advanced than was the appellant's class. Perhaps, therefore, the father meant that these two boys were not in the same class together at any time. Finally, it will be borne in mind that the alleged father has been in China at intervals only and therefore his knowledge of the schooling of these boys is based largely upon hearsay, which knowledge, at best, is imperfect.

In *Nagle v. Jin Suey*, 41 Fed. (2d) 523, C. C. A. 9th., there was considered the following discrepancy: the alleged father and his prior landed son testified that the applicant had gone to school at Canton City for three years, whereas the applicant testified that he had never gone to school there. The Court said:

“* * *. But, assuming the discrepancies touching the schools to be real, they sink into insignificance when compared with the many subjects upon which there is agreement, and some discrepancies are to be expected in the testimony of the most truthful witnesses. *Go Lun. v. Nagle* (C. C. A.), 22 F. (2d) 246; *Nagle v. Dong Ming* (C. C. A.), 26 F. (2d) 438.”

Although the testimony of the appellant and that of his alleged father is free from material discrepancies, nevertheless, the Secretary of Labor holds that the alleged father is discredited, because in 1921, he was unsuccessful in having a son, Chin Pok, admitted to the United States, it appearing at that time that Chin Pok was an adopted son, rather than a natural son. Of course, if the record were replete with discrepancies, the fact that the alleged father had previously claimed a son, who, according to the record, did not exist, would, no doubt, constitute additional ground for discrediting the alleged father. However, if the record be free from material discrepancies, we do not think that the bare fact that the alleged father was previously unsuccessful in having a son admitted, would constitute ground for discrediting him.

In *U. S. ex rel. Leong Jun v. Day*, 42 Fed. (2d) 714, the Court said:

“At a hearing accorded the applicant for admission in October, 1928, the father, who was born in the United States, testified that he was married and that the applicant is his son. In 1923, when he returned from China, he testified he was not married and that he did not have a marriage name. He now states that he so testified in 1923 because he was ‘scared.’

This is the only substantial discrepancy that appears in the record of the hearings to which the father and son were subjected separately.

The fact that the father testified falsely in 1923 evidently cannot deprive the applicant of his right to admission if he is the son of an American citizen.”

The Secretary of Labor, also, urges that the alleged father testified in 1921 that his village was not surrounded by a wall, whereas he testified in the appellant’s case that there was an adobe wall around the village. The alleged father explained that his 1921 testimony related to an embankment, rather than a wall. (Respondent’s Exhibit “A,” p. 13.) We, therefore, believe that the difference in testimony is largely due to misinterpretation, for which some allowance must be made.

Hom Chung v. Nagle, 41 Fed. (2d) 126, at page 129. Furthermore, in the same case, at page 127, it was said:

“* * *. The immigration records show that the father departed from the United States for China on October 24, 1914, and again on June 14, 1923, and returned to the United States from China on December 24, 1915, and on May 19, 1925. *As he*

*remained in China during these periods of absence, aggregating about three years, it may be assumed that he testified truthfully to the name of the village in which he lived during his absence, and that he is reasonably familiar with such village which he testifies contains only twelve houses. * * **

CONCLUSION.

The testimony in this case is in complete, as well as convincing, accord, and it bears no indication of having been the mere product of coaching. The appellant and the father have testified in considerable detail, and at considerable length, in describing their past relations and associations together, as father and child, on occasions when the father happened to pay visits to his home. The unimportant variations in this testimony, upon which the board has seized in an effort to accomplish the rejection of this appellant and his return to China, have but the remotest kind of a bearing upon the issue of relationship in the case, and they pale into utter insignificance when considered in the light of the record, as a whole, supplemented by the past claims of the father, made on varied and numerous occasions, that he has a son of the name of this appellant, born on the precise date that the appellant claims as his birth date.

Furthermore, the testimony offered to establish the identity of this appellant as the son, whom Chin Kim, his alleged father, has so often alluded to in the past, is supplemented by several letters, which the father

exhibited to the Board of Special Inquiry as having been received from the appellant and by an old photograph of the appellant, which the latter sent to the father in the year 1922.

In *Louie Poy Hok v. Nagle*, No. 6349, decided April 6, 1931, this Court said:

“The exact details as to the date on which applicant went to a neighboring village to enter a higher school are of minor importance and failure to agree does not discredit the testimony of the father or of the alleged son. Upon such particulars discrepancies are bound to occur.

If the circumstances respecting which the testimony is discordant be immaterial, and of such a nature that mistakes may easily exist, and be accounted for in a manner consistent with the utmost good faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of the human mind rather than from deliberate error. *Nagle v. Dong Ming*, 26 F. (2d) 438, C. C. A. 9th.

Of similar character is the discrepancy between the testimony of Louie Poy Hok, the alleged father, and the applicant as to where the latter slept. The alleged father claimed that during his last visit to China the son slept in the room with his father and mother, whereas the alleged son claims that he slept at school during that time. It is interesting that such a discrepancy arises very often in the course of questioning of Chinese applicants for admission and the disagreement in so many cases seems inexplicable. The weight given to this discrepancy, however, must be considered only in its relation to the texture of the testimony as a whole. *Wong Tsick Wye v. Nagle*,

supra; Ng Yuk Ming v. Tillinghast, supra; Hom-Chung v. Nagle, 41 Fed. (2d) 126, C. C. A. 9th." *Weedin v. Lee Gan*, No. 6334, C. C. A. 9th, decided March 16, 1931.

It is respectfully asked that the order of the Court below denying the petition for a writ of habeas corpus be reversed.

Dated, San Francisco,
May 11, 1931.

Respectfully submitted,

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Attorney for Appellant.